SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 553

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. E. SUTTLES, AS TAX COLLECTOR OF FULTON COUNTY, GEORGIA, W. COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS MEMBERS OF THE BOARD OF TAX ASSESSORS OF FULTON COUNTY, GEORGIA.

PETITION FOR REHEARING BY NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

DAN MACDOUGALD,
ROBERT S. SAMS,
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Of Counsel:
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.

TABLE OF CASES CITED

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PETITION FOR REHEARING BY NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, petitioner in the above entitled cause, and presents this its petition for a rehearing of the Court's denial of its petition for a writ of certiorari to the Supreme Court of Georgia, and in support thereof respectfully shows:

1.

This Court, on January 6, 1947, denied petitioner's application for a writ of certiorari to the Supreme Court

of the State of Georgia. On January 9, 1947, the Supreme Court of Georgia handed down a decision in the case of *Davis, et al., v. Penn Mutual Life Insurance Company,* a case which, like this one, involved the taxability of credits arising from loans made by a non-resident insurance company on the security of property located in Fulton County, Georgia. The Georgia Supreme Court in the latter case held that the mortgage credits owned by the Penn Mutual Life Insurance Company had not acquired a situs in Fulton County, Georgia, so as to be subject to ad valorem taxation in said county, as they did not arise out of a loan business conducted by said insurance company in Georgia. The situation presented in the *Penn Mutual* case is so analagous to that here presented that it serves to emphasize clearly the incorrectness of the Georgia court's decision in this case, and to illustrate how petitioner has been singled out for taxation in violation of its constitutional rights.

A consideration of the Georgia court's decision in the *Penn Mutual* case with its decision in the instant case emphasizes that the only difference in the activities in Georgia of the two companies was in the method of obtaining applications for loans, this being sufficient to localize the mortgage credits in one case but not in the other. The Georgia court makes the important factor to be *not where the loans are actually made,* but *how applications are secured.*

We believe this recent *Penn Mutual* decision fully warrants the filing of this petition for rehearing, and we request the Court to re-examine our application for certiorari and particularly in the light of this recent deci-

sion. As the case has not as yet been reported, we have obtained from the Clerk of the Georgia Court a certified copy thereof, and this is set out in the appendix to this petition for rehearing.*

2.

We ask the Court to compare the method employed by the Penn Mutual Life Insurance Company in making loans on the security of Georgia real estate, as described in the recent decision of the Georgia Supreme Court, with those employed by petitioner. The method described in the *Penn Mutual* case was as follows:

(a) The borrower would file with Lipscomb, Weyman & Chapman Company, a real estate broker in Atlanta, an agreement employing this broker to obtain for him a loan.

(b) The real estate broker would submit an application signed by the borrower to Graf, a salaried employee of the Penn Mutual Life Insurance Company, with an office in Atlanta.

(c) Graf received the application and inspected the property, and mailed his report, together with the application, to the home office of the Company in Philadelphia, to be there accepted or rejected. The Court points out that these were his only duties in connection with the loan, and that he never saw the applicant, his entire dealings being with applicant's agent, the real estate broker.

(d) The Finance Committee of the Penn Mutual

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* The Georgia Supreme Court had previously considered the *Penn Mutual* case on an appeal from the overruling of a general demurrer. This case is cited in our brief in support of petition for writ of certiorari, page 18. (*Davis v. Penn Mutual Life Insurance Company*, 198 Ga. 550, 32 S. E. (2) 180).

functioning in Philadelphia, passed on the loan and advised the real estate broker direct of their action.

(e) At the request of the broker, the home office wrote direct to the law firm of Alston, Foster, Moise & Sibley, in Atlanta, and this firm, although paid by the borrower and in theory at least representing the borrower, handled all details in connection with examination of title, preparation of papers such as were required locally and not in Philadelphia, and closed the loan. A check was sent from Philadelphia to the Alston firm, with instructions as to how it was to be disbursed, and it was deposited in a special bank account by this firm and disbursed pursuant to directions of the home office.

(f) Repayment of the loan was made either through the broker or direct to the home office in Philadelphia.

(g) Graf had extensive duties in connection with the collection of loans, and particularly in such cases where there was a default.

Petitioner had a paid employee, Durant, with an office in Atlanta. He was authorized to contact prospective borrowers and to submit applications for loans. He served as an intermediary between the Loan Department in Milwaukee and the applicants or borrowers in Atlanta. Like the Penn Mutual agent, he received applications which were forwarded to the home office and he inspected the property offered as security and gave his opinion. Like Graf, he had no authority to make a loan or to commit the Company to make a loan. He had no money under his control which he was authorized to lend. Like Graf, he also was primarily concerned with the protection of the security and the liquidation of the loans.

Actually, more of the matters in connection with the making of loans were performed by petitioner at its home office in Milwaukee than by the Penn Mutual at its home office in Philadelphia. While the Georgia Court emphasizes that Graf had no actual contact with the applicant for a loan, nevertheless Graf did have contact with the loan agent which had been specifically authorized to act as the agent of the borrower, and there is no difference in law between the application being submitted by the agent rather than by the principal.

As we have pointed out in our petition and supporting brief, the primary duty of petitioner's agent in connection with the loan was to see that the borrower performed those things required of him by the Finance Committee in Milwaukee. When the borrower's counsel obtained an abstract, this was forwarded to the home office. When other papers were furnished by the borrower as required, these were fowarded to the home office.

We submit that the loan business conducted by petitioner was as clearly located in Milwaukee as that conducted by the Penn Mutual was located in Philadelphia, and that there is no basis in the evidence in petitioner's case to justify a finding that anything was done locally to support a conclusion that such business had been localized.

It is unnecessary in this petition to point out how, such a position being sound, the decision of the Georgia Supreme Court would violate petitioner's constitutional rights. These have been fully set out in the petition for writ of certiorari and supporting brief.

3.

The distinction made between the methods employed by other insurance companies and this petitioner are distinctions without a difference. As pointed out in our petition for writ of certiorari (page 6), insurance companies engaging in lending money from a central office to borrowers over a wide territory, handle the solicitation of applications for loans to be submitted and passed on by the home office, to be there accepted or declined, by one of three methods:

(a) Borrowers or brokers submit the applications.

(b) The lending company appoints correspondents who are independent agents, to solicit and submit applications.

(c) The lending company employs salaried agents to solicit and submit applications.

The actual functions performed in each case are substantially the same. In the first two, the fees of the broker or correspondent are generally paid by the borrower. In the third, the salary is paid by the lender. But there is no real difference in the duties performed and one method no more constitutes the function of lending money than another. In none of them is there a localization of the business so as to justify taxing the loan credits elsewhere than at the home office where the loans are actually made.

The Georgia Supreme Court has held that the maintenance of an office in Fulton County for the purpose of protecting the security would not be sufficient to localize the loan business, regardless of the number of employees or the extent of the activities required in connec-

tion therewith, provided the purpose is merely the protection of the security and the ultimate collection or liquidation of the indebtedness. *Suttles v. Associated Mortgage Companies,* 193 Ga. 78, 17 S. E. (2) 272; *National Mortgage Corporation v. Suttles,* 194 Ga. 768, 22 S. E. (2) 386; *Davis v. Penn Mutual Life Insurance Co.* (See appendix). As we endeavored to point out in our original petition and supporting brief, between the years 1931-1937, which is the actual period in question, Durant, the salaried agent of petitioner, was engaged only in assisting petitioner in the protection of its security and the ultimate collection or liquidation of the loans. Not a single application for a loan was solicited, and the only activities of Durant were in connection with the loans which had previously been made.

The only activities ever engaged in by Durant, petitioner's agent, other than those outlined above, were in connection with the solicitation or receiving of applications for loans. While Durant during the period in question was authorized to receive and transmit to the home office any applications for loans, he did not actually do so. All activities of Durant in connection with solicitation were performed prior to 1931. In such cases, he merely received applications and forwarded them to the home office in Milwaukee.

That it is possible to lend money to borrowers on the security of real estate located in Fulton County Georgia, without engaging in said county in the business of lending money, is clear from the decisions of the Georgia Court. In each such case, the agents of the Company at the home office must receive applications for loans, pass

on such applications and decide whether to accept or reject them and, if accepted, the terms upon which they will be accepted. Does it produce a different result in law that an agent of the Company actually obtains an application for a loan from the prospective borrower and sends it in to the home office, rather than a broker or loan correspondent, approved by the lender but paid by the borrower, obtains the application and submits it either to a local agent of the company, who in turn forwards it to the home office, or sends it direct to the home office? To so hold would be in direct conflict with the principle that the localization of a business only takes place when the owner delegates authority to an agent in the place in question to conduct the business on his behalf at that place.

4.

We have found no case, other than this one, either of this Court or the courts of other States or of the courts of Georgia, where a local situs for intangibles has been upheld except where such intangibles have become a part of a local business under the authority and control of local management (See pages 20-23 of our brief in support of the petition for certiorari). While the Georgia Court in this case has set forth the correct principles of law to be applied, it has denied petitioner its constitutional rights in its application of those principles to the evidence of the case. This being so, we respectfully urge the Court to reconsider its decision and to grant the writ of certiorari sought. If petitioner was carrying on any business in Fulton County, Georgia, at most it was the business of soliciting applications. It was clearly not the busi-

ness of lending money. The two are not the same, either in law or in fact.

5.

This case is merely one of a series of cases growing out of the attempt of the tax officials of Fulton County, Georgia, to collect ad valorem taxes for 1937 and the six years prior thereto from non-resident companies owning notes secured by mortgages on real estate located in Fulton County, Georgia. Each of the non-resident life insurance companies involved, conducts its loan business at its home office, but the details in connection with the securing of applicants, the transmission of papers and other pertinent information vary slightly from company to company. The Georgia Supreme Court, in each of these cases considered by it, with the exception of this one, has held such credits to be non-taxable.* It has sought to distinguish this case from the others, based solely on the difference in the handling of the applications and other details in Georgia, which differences we submit are without substance and merely distinctions without a difference. Other such cases have been tried in the Fulton Superior Court and have resulted in decisions in favor of the non-resident insurance company. The only case in which the non-resident insurance company has been held subject to ad valorem taxation is the instant one.

The taxes, interest and penalties in this case exceed $275,000. If the Georgia Court's decision is allowed to

* National Mortgage Corp. v. Suttles, 194 Ga. 768; 22 S. E. (2) 386; Suttles v. Associated Mortgage Companies, 193 Ga. 78. 17 S. E. (2) 272; Davis v. Metropolitan Life Ins. Co., 196 Ga. 304; 26 S. E. (2) 618; Davis v. Penn Mutual Life Ins. Co. (See appendix).

stand, it will also serve as a basis for demanding taxes of petitioner for subsequent years of an additional large amount, when no other company conducting a loan business in the same manner as petitioner from a central office but employing different methods of securing applications, is required to pay any ad valorem taxes at all. The matter is, therefore, not only of substantial importance to petitioner and its policy holders (petitioner being a mutual company) by reason of the amount involved and by reason of the unequal competitive situation created, but of importance generally in that it constitutes a clear misapplication of well established and vitally important principles as to the taxation of intangibles belonging to a non-resident.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that petitioner's application for a writ of certiorari to the Supreme Court of Georgia be, upon further consideration, granted.

Respectfully submitted,

DAN MACDOUGALD,
ROBERT S. SAMS,
DUDLEY COOK,
Attorneys for Petitioner.

Of Counsel:
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.

I, Dan MacDougald, of counsel for the above-named petitioner, do certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Respectfully submitted,

DAN MACDOUGALD.

Appendix

No. 15638. Supreme Court of Georgia

Decided January 9, 1947

Davis et al. v. Penn Mutual Life Insurance Co.

By the Court:

1. A promissory note executed by a resident of this State, but owned by a non-resident and held by it at its domicile out of the State, is to be taxed here only if it is derived from or is used as an incident of property owned or of a business conducted by the non-resident or his agent in Georgia; and this is true although the note may be secured by a mortgage on land situated in this State.

2. "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto." Code, Sec. 110-104.

3. It is not error to exclude immaterial evidence.

On October 22, 1937, The Penn Mutual Life Insurance Company, a non-resident corporation with its home office in Philadelphia, filed a petition in the Superior Court of Fulton County, Georgia, against C. H. Gullatt, Reese Perry and H. W. Gilbert, as members of the board of Tax-assessors of Fulton County; Standish Thompson, as attorney for the board of tax-assessors; Guy Moore, as Fulton County tax receiver; and T. E. Suttles, as Fulton County tax collector, to enjoin a threatened assessment by the board of tax-assessors and its attorney of certain credits belonging to plaintiff for ad valorem state and

county taxes for the years 1931 to 1937, inclusive; to enjoin the tax receiver from entering any assessment against its property on the tax digest, and to enjoin the tax collector from issuing an execution against it with respect thereto. Later, by amendment, the names of C. H. Gullatt and H. W. Gilbert were stricken as parties and W. Comer Davis and John C. Townley, as successor members of the board of tax-assessors, were made parties defendant in their stead. The petition attacked the constitutionality of the statutes under which the tax-assessors acted, but by further amendment plaintiff struck from its petition all allegations concerning the validity of the statutes. The petition as it then stood alleged that plaintiff had been licensed to carry on a life insurance business in the State of Georgia, and incident to that business, which had been conducted for more than seven years, it owned valuable property in Fulton County on which it had annually paid all tax, state and county, required of it. The credits sought to be taxed were not connected in any way with its insurance business. The intangibles involved were evidenced by promissory notes signed by various citizens of Fulton County and secured by deeds to lands located in that county. They were owned by plaintiff, a non-resident corporation, and held at its domicile in Pennsylvania. They were not derived from or used as an incident of property owned or of a business conducted by plaintiff or its agent in Georgia. The notes representing the credits referred to were payable at plaintiff's office in Philadelphia, Pennsylvania, and at no time during the period for which an assessment was threatened had it engaged in any loan business in Georgia or had any agent in the State authorized to invest its funds or to deal in any manner with the notes.

During the entire period of time involved its notes and deeds had been physically situated and kept without the State of Georgia. The taxing authorities of Fulton County had threatened to assess such credits for State and County ad valorem tax, to collect taxes thereon, and that they would do so unless enjoined. Its credits had no tax situs in Georgia for those years, and the imposition of such a tax would violate the due process clauses of both the State and Federal constitutions. The defendants filed general demurrers to the petition as amended, alleging that it stated no cause of action for the relief sought and was without equity. The tax-assessors filed an answer admitting that they were preparing to assess the credits represented by the notes owned by plaintiff and secured by Fulton County real estate and alleged the property sought to be assessed for tax purposes arose out of a business conducted by the plaintiff through a local agent in Georgia. The tax receiver answered that he had no intention of making an entry of any assessment against plaintiff's credits, except when the same could be properly done. The tax collector answered that when the assessments were properly made he would issue executions. The demurrers were overruled by the trial court. An exception to that judgment brought the case to this court in 1944. This court affirmed the judgment of the lower court. See *Davis v. Penn Mutual Life Insurance Company*, 198 Ga. 550 (32 S. E. 2d, 180, 160 ALR 778).

In January, 1946, plaintiff amended its petition by setting out more fully how the notes were acquired. The amendment alleged in substance:

Weyman and Connors, later known as Lipscomb-Weyman-Chapman Company, and afterwards Lipscomb-Ellis

Company, a real estate dealer or broker of Atlanta, Georgia, would be employed in writing by a prospective borrower as his agent to negotiate a loan to be secured by certain land. Weyman and Connors submitted applications to various lenders. If the application was to be submitted to the plaintiff, Weyman and Connors would send it to Howard D. Graf, a salaried employee of plaintiff who had an office in Fulton County furnished him by plaintiff. Graf would inspect the applicant's property and would mail the application and his appraisal to plaintiff's home office in Philadelphia. The action of plaintiff's Finance Committee in Philadelphia in accepting, rejecting or modifying the application was communicated by plaintiff from its home office to Weyman and Connors. Applicant, through Weyman and Connors, would then arrange with Alston, Alston, Foster and Moise, attorneys at law, of Atlanta, if the terms of the loan were satisfactory to the applicant, for the examination of title and the preparing of the proposed loan papers, at the applicant's expense. The attorneys would mail an opinion of title and the proposed note and loan deed to plaintiff at Philadelphia. If the title and loan papers were approved by the plaintiff at its home office, plaintiff would return the note and loan deed to the attorneys with plaintiff's check to cover the proceeds of the loan. The attorneys would have the papers signed and would deliver the proceeds of the loan to the borrower, and would have the loan deed recorded, and would send all the papers to plaintiff at Philadelphia where they were kept at all times except when needed in Fulton County for cancellation, collection or foreclosure. Neither the attorneys, nor Weyman and Connors (or its successors), nor Graf had authority to approve any application for a loan, or fix the terms

of a loan, or to decide for the plaintiff whether or not the value of the property offered as security was sufficient, or to deal with the notes or credits, and they never did so. Graf had no authority to solicit applications for loans or to consummate a loan, and he never did so. The right to pass upon all such questions was at all times in plaintiff's Finance Committee which always met in Philadelphia.

The court overruled the defendant's renewed general demurrers to the petition as amended in January, 1946.

The case was tried before the court and jury in January, 1946. There was no disputed issue of fact raised by the evidence. The court directed a verdict for the plaintiff and entered a final decree enjoining the threatened assessment. The defendants' motion for new trial as amended was denied and they filed their bill of exceptions to this court.

The following undisputed facts were shown by the evidence:

The parties stipulated that the plaintiff is a Pennsylvania corporation organized as a life insurance company; that defendants had threatened to tax as alleged; that the plaintiff had paid tax on all real estate and other property owned by it in Fulton County with the exception of the notes and credits referred to; that to collect the taxes on the credits the defendants had threatened to seize the property of the plaintiff in Fulton County; that when the petition was filed and since then the plaintiff has owned real estate in Fulton County; that the method used by the plaintiff in acquiring the Jacob Batt Loan

in 1938 illustrates how the plaintiff acquired all of the loans in question.

The undisputed evidence showed that on January 19, 1938, Jacob Batt signed a written agreement employing Lipscomb-Weyman-Chapman Company, a real estate broker of Atlanta, as his agent to negotiate for a consideration of $250.00 a loan of $12,500.00 to be secured by a loan deed conveying to a lender, or such person or corporation as Lipscomb - Weyman - Chapman Company might direct, certain property known as 168 Moreland Avenue, N. E., in Atlanta, Georgia. The loan deed was to be a first encumbrance and Lipscomb-Weyman-Chapman Company was authorized by Batt to have the property appraised and surveyed and the title abstracted. Lipscomb-Weyman-Chapman Company did submit applications for loans to various prospective lenders. In this case it decided to have an application signed by Batt submitted to The Penn Mutual Life Insurance Company. The application was directed "to The Penn Mutual Life Insurance Company, Philadelphia, Penna." It showed that there was an outstanding first mortgage of $10,850.00 on the property in favor of Peoples Savings Bank of Rhode Island. The applicant agreed in the application that he would furnish a full brief of title and would pay all expenses of the loan, including counsel fees, cost of examining property and preparing papers, and that the proposed mortgage was to be a first lien.

Lipscomb-Weyman-Chapman Company (later known as Lipscomb-Ellis Company), gave that application, with its inspection report, to Howard D. Graf, a salaried employee of the plaintiff. Graf occupied an office in Atlanta furnished to him by the plaintiff. He has held his present

position in Atlanta since 1927. During the past ten years his title in the plaintiff's organization has been "Loan Supervisor" and prior that it was "Southern Loan Inspector." Graf inspected the property and mailed his report with the application to the plaintiff at its home office in Philadelphia. He never saw or communicated with the applicant either before or after he inspected the property, and he had no further duties in connection with the loan. The plaintiff's Finance Committee was unwilling to make a loan in the amount applied for, but did agree to make a loan of $11,000.00 on certain terms and so informed Lipscomb-Ellis Company, successor to Lipscomb-Weyman-Chapman Company, by letter mailed from Philadelphia. That company was requested to notify Jacob Batt of the action taken by the plaintiff at its home office in accepting, with modifications, his application for a loan, and to advise the plaintiff whether or not the terms of the proposed loan were acceptable to him.

The applicant informed Lipscomb-Ellis Company, who in turn informed the plaintiff at Philadelphia, that the terms of the proposed loan were satisfactory. At the request of Lipscomb-Ellis Company, plaintiff from its home office in Philadelphia wrote Alston, Alston, Foster & Moise, Atlanta attorneys, that subject to the conditions specified in the letter, the plaintiff had approved the application of Jacob Batt for a loan of $11,000.00; that the application came to plaintiff through Lipscomb-Ellis Company, who would communicate with the Atlanta attorneys; that all expenses connected with the transaction, including the fees of the Atlanta attorneys, were to be borne by the applicant, and that after that had been arranged the attorneys might proceed to examine the title and prepare the papers. Lipscomb-Ellis Company

in behalf of the applicant then requested the attorneys to examine the title and prepare the loan papers at the applicant's expense.

The preliminary title report showing the mortgage of $10,850.00 in favor of Peoples Savings Bank, with an abstract of title, the proposed note and loan deed were mailed on February 17, 1938, by the attorneys to the plaintiff at its home office in Philadelphia with a request that if the papers were found to be in order they be returned to them to be signed, and that the plaintiff send them a check for $11,000.00 "in settlement of the loan." The plaintiff from its home office on March 1, 1938, mailed to the attorneys its check for $11,000.00 drawn on a Philadelphia bank payable jointly to them and Jacob Batt and by letter accompanying the check instructed them that the money was to be appropriated to the payment of prior liens, expenses, including their fees, and the balance to the borrower, but that no part of the fund was to be used until they had ascertained it to be ample to meet each item and that the plaintiff's mortgage would be a first encumbrance.

The plaintiff's check for $11,000.00 was endorsed by the borrower and by the attorneys and was deposited by them in the Citizens and Southern National Bank of Atlanta, Georgia, to the credit of "Alston, Alston, Foster and Moise, Special Account No. 1." When the loan papers were signed by Jacob Batt the attorneys drew one check on this bank account for $10,850.00 payable to the order of Jacob Batt and Leopold J. Haas and Company. This check was endorsed by Batt to the order of Leopold J. Haas and Company who were correspondents

for Peoples Savings Bank, and was delivered to them in full payment of the first mortgage held by the Peoples Savings Bank. The attorneys drew another check to the order of Jacob Batt and Lipscomb-Ellis Company for $150.00, which was endorsed by Batt to Lipscomb-Ellis Company and applied by the latter in part payment of the compensation which Batt had agreed to pay for negotiating the loan. From money obtained from Batt, Lipscomb-Ellis Company paid Alston, Alston, Foster and Moise their fee for examining the title, preparing the papers, and distributing the proceeds of the loan at Batt's direction, so as to enable him to comply with his agreement in his application to make the loan deed to the plaintiff a first encumbrance. The borrower authorized and approved in writing the disbursements made by the attorneys.

The loan was closed in the office of Alston, Alston, Foster and Moise. No employee, agent or representative of the plaintiff was present at the closing. The attorneys on March 2, 1938, mailed the original note for $11,000.00, signed by Batt directly to the home office of plaintiff and later mailed the recorded loan deed together with the abstract of title and final opinion.

The loan papers were kept in Philadelphia until the note was paid. The note was payable to plaintiff at Philadelphia. Notices of maturity of interest and principal instalments were mailed to the borrower from the plaintiff's home office. Some borrowers made payment to Lipscomb-Ellis Company and others made payment directly to the plaintiff at its home office. Payments which were made to Lipscomb-Ellis Company were either forwarded

to the plaintiff in Philadelphia or deposited by that Company in a bank in Atlanta to the credit of plaintiff. No one but officers of plaintiff at Philadelphia had authority to draw any check on that bank account. None of the plaintiff's loans were closed by check drawn on any bank in Atlanta or Georgia.

On September 3, 1937, plaintiff and Lipscomb-Ellis Company entered into a "service agreement" which provided that the agreement "shall extend only to the particular loans to which it is the intention of both parties thereto that it should extend" and that the "intention is to be determined only from letters exchanged between the parties stating in effect that the loan in question is to be taken subject to this agreement." The plaintiff wrote Lipscomb-Ellis Company on March 1, 1938, that the Jacob Batt loan was to be under the provisions of the service agreement. Lipscomb-Ellis Company would "service" any loan which the plaintiff and Lipscomb-Ellis agreed should be covered by the service agreement. "Servicing" a loan includes checking the taxes on the real estate to see whether or not they are paid, collecting delinquent interest if notified to do so and keeping up with fire insurance and seeing that the borrowers keep the buildings insured against fire.

Howard D. Graf, upon being informed by Lipscomb-Ellis Company that a borrower had defaulted in the payment of his note and that the note could not be collected, made an investigation and informed the company at its home office the results thereof. In the event Graf's investigation showed that "the case is hopeless" he would recommend to plaintiff's home office that the loan deed be

foreclosed. Graf did not make collections.

Candler, Justice (after stating the foregoing facts.)

When this case was first here in *Davis v. Penn Mutual Life Insurance Company*, 198 Ga. 550 (32 S. E. 2d, 180, 160 ALR 778), we held the allegations of the petition as it then stood were sufficient as against general demurrer to show the credits sought to be assessed for State and County ad valorem taxes had no situs for such taxation in Fulton County or the State of Georgia. It is now urged that the allegations of an amendment to the petition which has been allowed subsequent to our prior holding are sufficient to show the credits have a tax situs in Fulton County and for that reason it was error to overrule their general demurrer which was renewed to the petition as amended. The defendant in error, however, takes the position the amendment did not materially change the substance of its petition, but on the contrary only set out in detail the procedure employed in making its loans and that the petition as finally amended shows that the notes sought to be taxed did not accrue out of or incident to property owned or a business conducted by it, or its agent in Georgia. If the amendment last allowed has so completely changed the petition that it now shows the credits of plaintiff have a tax situs for State and County purposes in Fulton County then it was error, of course, to overrule the renewed general demurrer to the petition thus amended; otherwise not. The motion for new trial as amended contains, besides the usual general grounds, nine special grounds, but as we view the writ of error it presents for decision only three questions, namely: (1) Does the amended petition allege a cause of action for the relief sought; (2) did the court err in

directing a verdict for the plaintiff under all the facts and circumstances disclosed by the record; and (3) did the court err in refusing to allow in evidence certain documentary evidence offered by defendants? We shall deal with these questions in the order stated.

1. This suit was filed October 22, 1937, and does not involve the amendment adopted in 1937 to art. 7, sec. 2, par. 1 (Ga. Code Supp. Sec. 2-5001) of the Constitution of 1877, and laws enacted pursuant thereto relating to tax on intangibles, nor to art. 7, sec. 1, par. 3 (Ga. Code Supp. Sec. 2-5403) of the Constitution of 1945. The question here presented must therefore be determined under the applicable provisions of the Constitution and laws of this State as they existed prior to June 8, 1937. The constitutional provision of force during the period involved in the instant case is: "All taxation shall be uniform upon the same class of subjects and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The political jurisdiction of a State does not extend beyond its territorial limits, and therefore it cannot lawfully impose a tax upon persons, natural or artificial, or property, residing or situated beyond such limits. A State can not tax where it has jurisdiction over neither the owner nor the property. In such a case the State affords no protection, and there is nothing for which taxation can be the equivalent. *Davis v. Penn Mutual Life Insurance Company, supra.* It is not disputed here that plaintiff is a non-resident corporation, with its home office in Philadelphia. It is, however, insisted that certain promissory notes owned by plaintiff are incident to and derived from a loan business conducted by it within the State and that these items of property are

within its taxing jurisdiction. Whether or not such items of property when owned by a non-resident have a tax situs in this State must necessarily depend upon the facts in each particular case. It has long been settled by rulings of this court that a promissory note of a citizen of this State, owned by a non-resident and held at his domicile outside of this State, is taxable here if it accrues out of or is incident to property owned or a business conducted by the non-resident, or his agent in Georgia. *Armour Packing Co. v. Savannah,* 115 Ga. 140 (41 S. E. 237); *Armour Packing Co. v. Augusta,* 118 Ga. 552 (45 S. E. 424, 98 Am. St. R. 128); *Suttles v. Northwestern Mutual Life Ins. Co.,* 193 Ga. 495 (19 S. E. 2,396, 21 S. E. 2d, 695, 143 ALR 343); *Colgate-Palmolive-Peet Co. v. Davis,* 196 Ga. 681 (27 S. E. 2d, 326); *Suttles v. Northwestern Mutual Life Ins. Co.,* 200 Ga. (38 S. E. 2d, 786); *Parke, Davis & Co. v. Atlanta,* 200 Ga. 296 (36 S. E. 2d, 773). And it is as equally well settled by the holdings of this court that a promissory note of a citizen of this State, owned by a non-resident and held at his domicile outside of this State, which does not accrue out of or is not incident to property owned or a business conducted by the non-resident, or his agent, in Georgia, has no situs for taxation in this State. *Collins v. Miller,* 43 Ga. 336; *Williams v. Mandell,* 44 Ga. 26; *Carhart v. Paramore,* 44 Ga. 262; *Cary v. Edmondson,* 44 Ga. 651; *Columbus Mutual Life Ins. Co. v. Gullatt,* and *Guardian Life Ins. Co. v. Gullatt,* 189 Ga. 747 (8 S. E. 2d, 38); *Suttles v. Associated Mortgage Cos.,* 193 Ga. 78 (17 S. E. 2d, 272); *National Mortgage Corporation v. Suttles,* 194 Ga. 768 (22 S. E. 2d, 386); *Davis v. Metropolitan Life Ins. Co., supra.* As was said by Mr. Justice Grice in the *Metropolitan case, supra,* "We must regard the law on this subject as having been established,

making it unnecessary to blaze any new trails in this field, or to even again mark out the lines. The aforementioned decisions not only point out the landmarks but they make plain the boundaries. The blazes are fresh and are before our eyes. Our object shall be to apply the law to the undisputed facts of this record." True it is, every case of this general type must depend on its own particular facts, because situs can be determined by facts and these only. The notes in the instant case are taxable or not taxable depending upon whether or not they accrue out of or are incident to property owned or a business conducted by the non-resident owner, or his agent, in this State. In our statement of facts we have set out in full the allegations showing the procedure employed in making the loans involved from the time the borrower first contacted the broker in his effort to secure a loan to the time when it was actually closed and the note and loan deed forwarded to plaintiff lender at its home office. It would serve no useful purpose to again state those several acts incident to negotiating and closing the loans. If these allegations show the broker, or plaintiff's loan supervisor, or the firm of attorneys who closed the loan, or any two or more of them, was agent for plaintiff vested with authority in any manner to conduct for it a loan business in this State, then the petition did not state a cause of action for the relief prayed. *Suttles v. Northwestern Mutual Life Ins. Co.*, 193 Ga. *supra*. It was held by this court in *Davis v. Metropolitan Life Ins. Co., supra,* where an application for loan was made by a borrower through a broker as its agent and closed by a Trust Company, also an agent for the borrower, where procedure almost identical to that here employed was followed in making and closing the loan, that neither was a loan

agent of the lender, so as to give the credits involved a tax situs in this State. "By using intermediaries as channels of transmission for papers, relying upon their inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute them his agent to make the loan, and is not chargeable with the consequences of dealings between them and the borrower, whether those dealings be public or private, known or unknown." *Merck v. American Freehold etc. & Co.*, 79 Ga. 213 (2) (7 S. E. 265). In the *Merck* case Mr. Chief Justice Bleckley further said: "Implications of agency are easily over-strained, misapplied or otherwise abused . . . If he holds control of his capital and decides for himself when he will part with it, and on what terms, and has no terms but lawful interest and good security, and satisfies himself that the security is good, he transacts his own business and is not to be judged by the law of agency."

Applying the principles announced in very recent cases from this court, which we have cited, where efforts were made to tax credits where the loans were made under like procedure, we do not think the broker who accepted the loan application here involved or the attorneys who closed the loan were agents of the plaintiff, conducting for it such a loan business in this State as would give a tax situs to its loans so made. Both the broker and the attorneys who closed the loan were by express contract employed by the borrower as his agents to obtain and close the loan, and no services rendered by them in connection with the loan had the legal effect of changing the status of agency to one between them and the lender.

We therefore hold the allegations in the amended petition did not show the broker or the firm of attorneys who closed the loan were agents of the lender vested with authority to conduct a loan business for it in Georgia so as to make its credits taxable in this State. But what of the plaintiff's salaried loan supervisor Graf, and his connection with the loans? The allegations of the amended petition show his primary duty was to service the plaintiff's loans after they were made and upon authority of the Metropolitan case we hold "the maintenance of an office and agency in this State for the purpose merely of protecting the security and ultimate liquidation of the indebtedness, the papers themselves being sent into this State only when needed for collection, renewal or foreclosure, would not be using them in this State as an incident of property owned or of a business conducted in Georgia so as to give taxable situs here." Graf rendered no service to his employer in making the loans except to receive the application for a loan from the broker, inspect the property offered as security and transmit the application, together with his inspection report to the home office of the lender. With this done his entire connection with the application terminated. Unlike Durant in the Northwestern case, supra, he had no authority to solicit loans, and he never did, he had no contact or dealings with the borrower, he took no part in the preparation of papers connected with the loan, did not deal in any way with the attorneys who closed the loan, handled no part of the funds loaned, and no communication from the lender either with the borrower, the broker or the attorneys who closed it passed through his office. He was not present when and had no part in the preparation of the application for the loan or when it was approved by

plaintiff's finance committee. He took no part in making title investigations or in the preparation of the loan papers, neither was he present nor did he participate in any way with the closing of the loan. His employer did not rely upon him for any of these services in making its loans, but on the contrary trusted the agents of the borrower for this. We can not bring ourselves to believe that the services rendered by Graf in connection with plaintiff's loans were sufficient to show that it was conducting a loan business in this State through him as an agent so as to give a tax situs here for its credits.

We think the court properly found that the petition as amended stated a cause of action for the relief prayed and therefore did not err in overruling the general demurrer which was renewed to the petition as amended.

2. "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto." Code, Sec. 110-104. The stipulation between the parties and the evidence introduced by the plaintiff showed without dispute that the allegations contained in the petition as amended were true and as a matter of law they demanded a verdict for the plaintiff. It was therefore not erroneous for the court to direct the jury to find for the plaintiff as he did.

3. Complaint is made that the court excluded from evidence a bank book showing a special account maintained by Alston, Alston, Foster & Moise, the firm of attorneys who closed the loan here involved, in a named bank. It is insisted this evidence would have disclosed the

intangibles of the plaintiff were derived from or used as an incident of property owned or a business conducted by plaintiff in this State. We find ourselves unable to agree with defendants in this contention. The undisputed evidence shows that plaintiff in making the loan in question forwarded to the closing attorneys a check for the amount of the loan payable jointly to them and the borrower, with instructions to disburse the proceeds so that the loan being made would be a first lien on the property offered as security. The borrower endorsed the check to his agent, the closing attorneys, who deposited the same to their special account, without the knowledge or direction of the lender and immediately disbursed the funds for purposes of the loan. In these circumstances we are unable to understand how this evidence could have illustrated a taxable situs for plaintiff's loan in this State. It is sufficient to say this assignment is without merit.

It follows from what has been said in the three preceding divisions that the court did not err in overruling the general demurrer to the amended petition, and in refusing to grant a new trial.

Judgment affirmed. Chief Justice Jenks, Associate Justices Bell, Atkinson and Wyatt, and Judges Price and Townsend concur. Duckworth, P. J., and Head, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

January 10, 1947.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

K. C. BLECKLEY,
Clerk.